Nos. 12,195 and 12,196

IN THE

United States Court of Appeals

For the Ninth Circuit

BRUCE G. BARBER, as the District Director of the U. S. Immigration and Naturalization Service for the Northern District of California,

Appellant,
(Respondent Below)

vs.

TADAYASU ABO, et al., etc.,

Appellees,
(Petitioners Below)

No. 12,195

and

BRUCE G. BARBER, as the District Director of the U. S. Immigration and Naturalization Service for the Northern District of California,

Appellant,
(Respondent Below)

vs.

MARY KANAME FURUYA, et al., etc.,

Appellees.
(Petitioners Below)

No. 12,196

APPELLEES' PETITION FOR A REHEARING.

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APPELLEES' PETITION FOR A REHEARING.

(NOTE): The appellees herein are referred to as petitioners and the appellants as respondents.

To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Shinichi Jimmy Aoki and Kiyoshi Wakabayashi, and all other adult appellees (petitioners below), against whom an unfavorable opinion and decisions herein were handed down by this Court reversing the judgments of the District Court below and remanding the causes as to them to that Court, demand a rehearing of their causes on appeal upon the following grounds and for the following reasons:

I.

THIS COURT'S OPINION OVERLOOKED FACTORS WHICH RENDER THE STATUTE VOID FOR DENYING EQUALITY AND DUE PROCESS OF LAW.

The renunciation statute, Title 8 USCA, Sec. 801(i) (Act of July 1, 1944 (58 Stat. 677)), was enacted by Congress at the special instance and request of the Justice Department for the disclosed sole purpose of procuring the renunciations of a special group of Nisei detained in our concentration camps simply to insure a prolongation of their unconstitutional internment and for no other purpose whatsoever. See Burling affidavit, R. 158-161 in No. 12251-2, so admitting and relating its history. It was applied to them and to no other persons or class of persons. When the renunciations of Nisei had been obtained in the concentration camps and their continued internment thereby was assured and the Attorney General had time to approve and did approve those renunciations by the middle of 1947, Congress, obviously

on the suggestion of the Attorney General, by Joint Resolution of July 25, 1947, 61 Stat. 449 at 454, *rendered the statute inoperative* along with a large number of other emergency and war power measures.

If the renunciation statute is not special class legislation there is no such thing as class legislation. If, as applied to petitioners, it was not an unequal application of the law there is no such thing as an unequal application of the law. The test of equality in the application of a law, within the rule announced in *Yick Wo v. Hopkins,* 118 U.S. 356, is not whether legislation might or could be applied equally to all persons within a proper classification but whether or not it actually so is applied. If the Justice Department can use a consenting Congress to pass temporary legislation, in the guise of permanent legislation, for it to apply only to Nisei held in prison simply because of their lineage and, so soon as its agents have procured their renunciations and the Attorney General has been given time to approve those renunciations, then has Congress render the statute inoperative so that it cannot be applied to others it is obvious the law is special discriminatory class legislation and that it was applied with an evil eye and an unequal hand.

The motive that prompted the passage of the statute, the purpose to which it was put and the fact that it was rendered inoperative immediately the special purpose had been served, thereby blocking all other persons from renouncing, demonstrates it was designed as special discriminatory class legislation and was used as such. The

short time during which it was in force in itself shows that it was to serve the limited purpose of obtaining renunciations of the Nisei arbitrarily and wrongfully imprisoned and of no other persons. The statute states on its face that it shall be in force and effect "whenever the United States shall be in a state of war." We are still in a state of war but the statute is not in force and effect. It has been operative since July 25, 1947. In consequence, no conclusion can be drawn from these facts except that the discrimination against the Nisei was a deliberate congressional and executive policy to obtain the renunciations of a special group of imprisoned Nisei and to block all other persons in prison and out of prison from like renunciations. As such it was not only special class legislation but was applied unequally and violates the due process clause of the 5th Amendment. We direct attention also to the fact that the Justice Department cannot show that it was applied to persons other than already interned Nisei.

II.

THIS COURT FAILED TO CONSIDER AND PASS ON QUESTIONS THAT THE STATUTE IS VOID FOR BEING A BILL OF ATTAINDER AND AN EX POST FACTO LAW.

Congress passed the renunciation statute to obtain renunciations from the incarcerated Nisei and from no other persons for the admitted purpose of converting their unconstitutional detention into internment just to insure their continued detention "without violating the Constitution." (See R. 160.) The Attorney General took their re-

nunciations for that specific purpose, ordered them interned and thereafter threatened them with removal to Japan although none of them had been guilty of violating any law. In consequence, the statute, on its face and as applied, is nothing but a bill of attainder proscribed by Clause 3, Section 9 of Article I of the Constitution. Further, because this punishment was inflicted upon them for what the government deemed was past disloyal conduct or expression, although no hearings on such a matter had been given them, the statute, the internment and removal orders are void for being *ex post facto* and prohibited by Clause 3, Section 9 of Article I of the Constitution. This Court failed to consider and pass on these important questions of law.

III.

THE RENUNCIATIONS ARE VOID BECAUSE THEY WERE TAKEN DURING AN ILLEGAL DETENTION AND WERE THE FRUITS OF WRONGDOING BY THE GOVERNMENT.

Further, the renunciations taken by the Attorney General while the petitioners were held in concentration camps, pursuant to the admitted governmental objective, i.e., to insure their continued detention, are illegal on their face for being *"the fruits of wrongdoing"* by the federal government and its agents. See principle announced in *Weeks v. U. S.*, 232 U.S. 383; *McNabb v. U. S.*, 318 U.S. 332; and *Upshaw v. U. S.*, 335 U.S. 410.

This Court's opinion indicates this Court failed to consider the foregoing matters and authorities although they clearly demonstrate a forbidden deprivation of due process

which voids the renunciation statute. See appellees' petition for rehearing in companion equity cases Nos. 12251-2 for amplification of these points.

IV.

REMOVAL WAS NOT SANCTIONED BY CONGRESS.

Before V-J Day the Attorney General, pursuant to his declared recommendation that resulted in the passage of the renunciation statute, i.e., that it was to be used for the purpose of *detention* (R. 160 in No. 12251), kept the renunciants interned. After V-J Day he suddenly decided to remove the internees to Japan as though they were alien enemies. Congress had not been informed that the statute was to be utilized by him as an instrument to accomplish any such removal and never has expressed approval of any such removal action. It had been informed that the sole purpose was to provide for the detention of American citizens not charged with crime without doing violence to the Constitution. See R. 160 in No. 12251. At most, therefore, the statute may be construed, by implication, to extend congressional authority to the Attorney General to intern the already detained persons but it certainly cannot be construed to authorize their removal to Japan. The Joint Resolution of July 25, 1947, which rendered the statute inoperative was equivalent to a Congressional declaration that it no longer was desirable to detain any such restrained person. This Court's opinion indicates it failed to give this matter consideration.

V.

THIS COURT FAILED TO CONSIDER AND PASS ON THE CONTENTIONS THAT THE RENUNCIATIONS WERE ILLEGAL FOR BEING (1) THE PRODUCTS OF AN UNCONSTITUTIONAL DETENTION, (2) THE PRODUCTS OF WRONGDOING BY THE GOVERNMENT, AND (3) THEY WERE OBTAINED BY COERCION, AND (4) THEY WERE THE PRODUCTS OF INDUCEMENT.

These questions which this Court failed to consider and pass on are set forth in appellees' petition for a rehearing in the companion equity appeals, Nos. 12251 and 12252, and are incorporated herein by this reference.

VI.

PETITIONERS' MOTIONS FOR JUDGMENT ON THE PLEADINGS PROPERLY WERE GRANTED BY TRIAL COURT.

In paragraph II of the amended petitions for writ of habeas corpus (R. 100) the petitioners alleged:

> "Each petitioner is a person of Japanese ancestry and at all times herein mentioned has been and is domiciled in the United States and has been and is a resident of the northern district of California therein; each is a native-born American citizen and national of the United States and subject to the jurisdiction thereof; * * *"

In paragraph II of the respondents' amended returns (R. 134-5) to the amended petitions for writ of habeas corpus, the respondents make the following admission, in answer to the allegations of paragraph II of the amended petitions for the writ (R. 100):

"Respondents admit that each petitioner is a person of Japanese ancestry, a native, domiciliary of the United States, and a resident of the Northern District of California."

It also contains an assertion, as follows:

"Respondents assert that each Petitioner is an alien and a citizen and subject of Japan, * * *"

The petitioners moved for judgment on the pleadings that the writ of habeas corpus issue and the petitioners be discharged from custody. (See R. 156.) No opposition thereto was filed by the respondents. No cross motions for judgment on the pleadings were filed by the respondents. The sole question then tendered by the pleadings was whether or not the interned petitioners were subject to internment and removal under the provisions of the Alien Enemy Act. This involved nothing but a question of law.

The respondents' *admission* that each petitioner is a native, domiciliary and resident of the United States controls the respondents' *assertion* that each was an alien, citizen and subject of Japan and completely negatives that assertion. The admission left nothing to be decided by the Court except the question of law whether they were subject to detention and removal under that Act. In addition to that admission there was proof that each petitioner was a citizen.

The fact that a person is born in the United States and is a resident carries with it the inference that he is a citizen. In the absence of proof to the contrary a person

is presumed to be a citizen of the country where he resides. Citizenship once shown to exist is presumed to continue. See 14 C.J.S. 1150, Sec. 18 and cases there cited. Inasmuch as the U.S. citizenship of each petitioner not only was admitted by the respondents' pleading but was proved and no contrary evidence was offered by the respondents none of the petitioners were subject to the provisions of the Alien Enemy Act. In consequence no issue other than the question of law whether petitioners were subject to internment and removal to Japan under the provisions of the Alien Enemy Act was presented and tendered by the pleadings for decision. The trial Court had no alternative except to grant the petitioners' motions for judgment on the pleadings that the writ of habeas corpus issue commanding production of petitioners in Court there to be discharged from custody without hearing being required. (R. 156.) The motions were resolved in the Court orders granting applications for writ of habeas corpus. (R. 175.) The petitioners' motions for judgment on the pleadings specifically were granted in the order denying respondent's motions and granting petitioners' motions and releasing petitioners from respondent's custody and awarding writ of habeas corpus and ordering its issuance. See R. 191 and 192 for specific mention that said motions were granted. Thereupon the writs issued. (R. 194.)

This Court's opinion completely overlooks the significance of the foregoing—it makes no mention of it and leaves this important matter unanswered.

VII.

PETITIONERS' MOTIONS FOR SUMMARY JUDGMENT PROPERLY WERE GRANTED BY TRIAL COURT.

On October 14, 1946, petitioners filed their "Motions for Summary Judgment That Writ of Habeas Corpus Be Awarded and Issue Commanding Production of Petitioners in Court There to Be Discharged From Custody Without Hearing Being Required." (R. 154.) Affidavits of merit were filed in support thereof, as specified in the motion at R. 155. The affidavits are the particular pleadings and personal affidavits specified at R. 162-164 and printed in the Transcript of Record in companion proceeding on appeal No. 12251.

On November 12, 1946, the respondents filed "Respondents' Points and Authorities in Opposition to Complainants' Motions for Summary Judgment and Cross Motions for Summary Judgment." See R. 161 for part thereof which refers to the cross motions, the remainder, consisting of points, authorities and argument, being deleted from the printed record. (No like cross motions or opposition, however, were filed by the respondents to the petitioners' motions (R. 156) for judgment on the pleadings.) In support thereof they filed, as parts thereof, the affidavits of Burling, Rothstein, Collins, Shevlin and Scott and the affidavit of Thomas M. Cooley, II, to which was attached the unverified documents, Exh. A (memorandum by Kenzo Takayanagi) and Exh. B (prepared by an undisclosed person of the Library of Congress), purportedly relating to Japanese nationality laws. On December 18, 1946, petitioners filed their objections thereto and moved

to strike those two exhibits along with other matter therein. (See R. 164.)

In this Court's opinion the following reference to those exhibits appears:

> "Here an attempt was made by the respondents to show that the law of Japan created a dual citizenship by offering in evidence two unverified statements of Japanese statutes."

This Court's opinion states that petitioners' motions to strike those exhibits on the ground of hearsay should have been granted and that the exhibits did not constitute the best evidence of Japanese statutes. What we desire to point out is that if stricken out they would be entitled to no weight on determining the motions and would have presented no issue. Inasmuch as the trial Court took the motion under submission, subject to the objections and exceptions thereto and the motion to strike the same, it was competent not only to rule on those motions but also to determine what evidentiary weight, if any, might be given to those exhibits. The trial judge was aware of the inadmissibility of those exhibits and also of the fact that no evidentiary weight was to attach to them. His order granting applications for writ of habeas corpus (R. 175) and his memorandum decision denying respondents' motions to vacate order granting applications for writ of habeas corpus (R. 182 and reported in 76 F.S. 664) and his opinion in the companion equity appeal (R. 410 in equity appeal No. 12251, reported in 77 F.S. 806) make this abundantly clear.

We also point out that the respondents and their counsel were aware that those two exhibits were inadmissible and that they were not entitled to evidentiary weight. They had ample opportunity to introduce properly authenticated evidence concerning Japanese nationality laws as well as to make offers of proof thereon or to enter into stipulations relating thereto but they did not do so and never expressed any desire or intention of so doing. They were content to submit the cause on the merits of their motions for summary judgment along with the petitioners' like motions, confident that the trial Court would decide either for or against them and thus dispose of the case in its entirety.

Inasmuch as the respondents did not attempt to introduce competent evidence concerning Japanese nationality laws but were content to have the cause decided on the merits as submitted on the respective motions for summary judgment it ill becomes this Court to reverse judgment simply to enable them to do so at this late date or to order or suggest that they do so. This seems to us to be no concern of the Court. It was a concern of the respondents and they, by intentionally submitting the cause for determination on the merits of their motions, waived their right so to do and to have the orders awarding the writ and discharging the petitioners from custody re-opened. In effect, this Court's Opinion seeks to inject into the cases evidence the respondents did not introduce and never even offered and had no intention of offering.

If the trial Court's decision had been against the petitioners for a failure to introduce or offer evidence we doubt that this Court would have reversed judgment just

to enable them to cure the deficiency. We submit that it is not the function of a Court, trial or appellate, to instruct the respondents or any party litigant what evidence they should or must produce. That is a matter for the parties litigant and their counsel to determine. If either side wishes to submit a case knowing that certain proffered evidence is inadmissible or not entitled to any evidentiary weight or without submitting evidence it is entitled so to do without suggestion or interference by the Court. When an Appellate Court reverses a judgment with directions or suggestions to a party litigant or counsel to fetch admissible evidence on an issue it intrudes beyond the judicial sphere and invades the domain reserved to counsel and the parties they represent.

This Court's opinion indulges in speculation concerning the nature of Japanese nationality laws and possible effect they might have on American citizens and residents under various circumstances. While it states it "expresses no opinion on any of these situations" it, nevertheless, leaves little doubt as to what its decision would be were such situations to arise. However, Japanese law in nowise was involved in the cases and could have presented no issue of fact or law affecting any of the petitioners for the reasons that follow:

Assuming arguendo that before renunciation an interned petitioner had sought Japanese citizenship. The mere seeking of a foreign citizenship would not constitute a forfeiture of American citizenship and would not confer foreign citizenship. The only methods of losing U.S. nationality are those formal ones specified in Title 8 USCA. See, Sec. 801. None of these specify that the

seeking or solicitation of foreign citizenship costs U.S. citizenship. Assume that a resident citizen renounced and thereafter claimed foreign citizenship. A mere claim would not confer foreign citizenship upon him. If any of the congressionally prescribed methods of surrendering nationality within the United States are taken voluntarily by a person there can be no acquisition of a foreign citizenship unless he thereafter leaves the United States and enters into the territorial jurisdiction of the foreign country where its laws are operative and there completes his expatriation by giving allegiance to the foreign government and acquiring its nationality. See *Savorgnan v. U. S.*, 338 U.S. 491, 502.

Our native born are citizens under the 14th Amendment and, as such, by law have a single allegiance to our government. Any law of Japan which might assert that American born children of resident Japanese parents are subjects of Japan and owe it allegiance could not possibly have any extraterritorial effect. See Title 8 USCA, Sec. 800, where Congress expressly rejects any claim that American citizens are "subjects of foreign states, owing allegiance to the governments thereof". That disavowal completely disposes of any contention that any resident American born citizen can possess dual nationality, As a matter of law, therefore, no petitioner as at the time of renunciation or thereafter had or could acquire dual nationality.

As a matter of law, also, no petitioner prior to renunciation could have had Japanese citizenship and none since then could have acquired it. If peace had formally been declared a renunciant liberated from internment

thereafter might have been enabled to acquire Japanese nationality under Title 8 USCA, Sec. 801 (b) by taking an oath or making an affirmation or other formal declaration of allegiance to Japan. However, this avenue was barred during the period of hostilities and has been closed ever since then for want of a Japanese diplomatic officer authorized by Japan to administer the same because all diplomatic relations were severed. It was also closed by the common law rule forbidding expatriation during wartime, as pointed out on page 38 of appellees' brief. It is conceivable, that except for that rule, a renunciant liberated from internment thereafter might have been enabled to acquire Japanese nationality but, in order so to do, he first would have to become an expatriate from the United States, that is to say, he would have to leave this country and enter the territorial jurisdiction of Japan. Until he did so Japan could acquire no jurisdiction over him for its laws have no extraterritorial effect. Its laws could have no extraterritorial application especially during the existence of the state of declared war which has existed from December 7, 1941, to this date and may continue for an indefinite period of time. Once in Japan he would have to comply with the Japanese nationality laws to acquire Japanese citizenship. The laws of Japan, however, have no extraterritorial effect. A right to naturalize persons physically within the jurisdiction of the United States could be conferred upon Japan only by a treaty provision entered into by the United States. This country never has conferred upon Japan, by treaty provision or otherwise, a right to naturalize any person within our jurisdiction. In consequence, as a matter of law none

of the resident petitioners, all of whom were in detention at the time of renunciation and in technical custody in this country since could have acquired Japanese nationality. It was and is legally impossible.

This Court's Opinion overlooked the point that Japan's laws have no extraterritorial effect, especially during the existence of the state of declared war. It also overlooked the fact that no treaty provision confers upon Japan the right to naturalize residents physically within the boundaries of the United States. It overlooked the fact that from the advent of the war to date no Japanese officer authorized to administer Japanese naturalization oaths has been present in this country for such a purpose by reason of the rupture of diplomatic relations. It overlooked the fact that it was a legal impossibility under our own law for any petitioner to acquire Japanese nationality. It gave these important matters no consideration.

VIII.

HABEAS CORPUS APPEALS ARE MOOT AS TO ALL BUT 138 APPELLEES.

There are 302 renunciants against whom removal orders still appear to be outstanding. See list of their names attached to defendants' petition filed in this Court to substitute a successor defendant, filed about November 8, 1949. Of those named therein, 136 are appellees in habeas corpus appeal No. 12195 when 2 are appellees in habeas corpus appeal No. 12196. The remaining 164 never were parties to the habeas corpus proceedings. However, all

of the 302, in due course, became parties to the equity suits, appeals Nos. 12251 and 12252. The 138 in the habeas corpus cases were *released* to their counsel and the 164 were *paroled* to him a few days prior to the execution of the formal Consent that appears on pages 196-7 of the Record in No. 12195. In consequence, the habeas corpus appeals are moot as to all the appellees save the 138 against whom removal orders still are outstanding.

CONCLUSION.

For the foregoing reasons said appellees urge this Court to withdraw its Opinion herein, to set aside its orders reversing the judgments of the District Court below as to them and remanding the causes to that Court, to grant them a rehearing on the serious issues involved herein and thereupon affirm the judgments of the Court below.

Dated, San Francisco, California,
February 16, 1951.

Respectfully submitted,
WAYNE M. COLLINS,
Attorney for Appellees
and Petitioners.

Certificate of Counsel.

The within petition for a rehearing is well rounded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,
February 16, 1951.

Wayne M. Collins,
Attorney for Appellees
and Petitioners.